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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PATRICK HOWARD,)	Civil No. 09-CV-2416-IEG(WVG)
)	
Plaintiff,)	ORDER FOLLOWING <i>IN CAMERA</i>
)	REVIEW
v.)	
)	
COUNTY OF SAN DIEGO, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

Counsel for Defendants has lodged 488 pages of documents and 4 compact discs with the Court for *in camera* review. Many documents are relevant to the subject matter of this litigation. However, Defendants claim that various privileges and the right of privacy protect these documents from disclosure. Having reviewed the documents, the Court orders their production, non-production, and redaction as set forth in Appendix A to this Order.

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I. LEGAL STANDARD

Under the Federal Rules of Civil Procedure, parties may obtain discovery regarding any matter that is "not privileged" and "relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). The scope of discoverable information is broad, as "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id.

In civil rights cases brought under federal statutes, questions of privilege are resolved by federal law. Kerr v. U.S. Dist. Ct. for N.D. Cal., 511 F.2d 192, 197 (9th Cir. 1975). "State privilege doctrine, whether derived from statutes or court decisions, is not binding on federal courts in these kinds of cases." Kelly v. City of San Jose, 114 F.R.D. 653, 655-56 (N.D. Cal. 1987).

II. DISCUSSION

A. Official Information Privilege^{1/}

Defendants first invoke the qualified "official information privilege," which is one of federal common law. Soto v. City of Concord, 162 F.R.D. 603, 613 (N.D. Cal. 1995); Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033 (9th Cir. 1990). "To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages." Sanchez, 936 F.2d at 1033-34. The balancing test "is moderately pre-weighted in favor of disclosure." Kelly, 114 F.R.D. at 661. The privilege "must be formally asserted and delineated in

^{1/} This privilege has also been known as the "government privilege," the "law enforcement privilege," and the "executive privilege." See Deocampo v. City of Vallejo, 2007 U.S. Dist. LEXIS 43744, *4 (E.D. Cal. 2007) (citing references for each variant).

1 order to be raised properly," and the party opposing disclosure must
2 "state with specificity the rationale of the claimed privilege."
3 Kerr, 511 F.2d at 198.

4 To properly invoke the governmental privilege, "[t]he
5 claiming official must 'have seen and considered the contents of the
6 documents and himself have formed the view that on grounds of public
7 interest they ought not to be produced' and state with specificity
8 the rationale of the claimed privilege." Id. The party invoking
9 the privilege must at the outset make a "substantial threshold
10 showing" by way of a declaration of affidavit from a responsible
11 official with personal knowledge of the matters to be attested to in
12 the affidavit. Soto, 162 F.R.D. at 613. The affidavit must contain
13 the following:

14 (1) an affirmation that the agency generated or collected the
15 material in issue and has in fact maintained its confidential-
16 ality, (2) a statement that the official has personally
17 reviewed the material in question, (3) a specific identifica-
18 tion of the governmental or privacy interests that would be
19 threatened by disclosure of the material to plaintiff and/or
his lawyer, (4) a description of how disclosure subject to a
carefully crafted protective order would create a substantial
risk of harm to significant governmental or privacy inter-
ests, and (5) a projection of how much harm would be done to
the threatened interests if the disclosure were made.

20 Id. at 613; Kelly, 114 F.R.D. at 670.

21 "[A] general claim of harm to the 'public interest' is
22 insufficient to overcome the burden placed on the party seeking to
23 shield material from disclosure.'" Soto, 162 F.R.D. at 614 (quoting
24 Kelly, 114 F.R.D. at 672; see also Miller v. Pancucci, 141 F.R.D.
25 292, 300 (C.D. Cal. 1992)); Chism v. County of San Bernardino, 159
26 F.R.D. 531, 534-35 (C.D. Cal. 1994). "The party resisting discovery
27 must specifically describe how disclosure of the requested documents
28

1 in that particular case . . . would be harmful." Soto, 162 F.R.D.
2 at 614 (citations omitted) (emphasis in original).

3 After considering the declaration submitted by San Diego
4 Sheriff Lieutenant W. Donahue, the Court concludes that Defendants
5 have not satisfied the second and fourth prongs listed above.
6 Moreover, Lt. Donahue's identification of the threatened governmen-
7 tal or privacy interest, as well as his projection of the resulting
8 harm, lack specificity and are couched in more sweeping, general
9 terms. As a result, Defendants may not withhold any documents on
10 basis of the official information privilege.

11 **B. Required Reports Privilege**

12 Defendants invoke proposed Federal Rule of Evidence 502, the
13 California Penal Code, and three questionable cases in support of
14 their assertion of this privilege. However, none of these authori-
15 ties are controlling or binding on this Court, and Defendants have
16 cited no controlling authority that has applied this privilege in
17 the context of a civil rights action against a law enforcement
18 agency. Quite to the contrary, based on the very cases Defendants
19 cite, the Court concludes that the required reports privilege is
20 inapplicable here for several reasons.

21 First, Califano discusses this privilege as being another
22 name for the official information privilege, which Defendants
23 simultaneously invoke. See Ass'n for Women in Science v. Califano,
24 566 F.2d 339, 343-44 (D.C. Cir. 1977).

25 Next, Defendants' own cases vitiate their invocation of this
26 privilege. First, Califano suggests that this privilege does not
27 apply to the type of reports Defendants seek to shield from
28 disclosure: "This privilege covers a wide range of situations in

1 which the government seeks to protect from disclosure confidential
 2 reports which it has received from citizens." Id. at 343 (emphasis
 3 added). The internal affairs reports at issue here were not
 4 received from a citizen; the government agency itself created them.
 5 Defendant's next case, In re Grand Jury Subpoena Dated Nov. 14,
 6 1989, 728 F. Supp. 368 (W.D. Pa. 1990), which has been cited by only
 7 two district courts since it issued over 21 years ago, also confirms
 8 that the "required reports privilege" does not apply to the type of
 9 reports Defendants seek to insulate here:

10 The . . . "required reports privilege," stems from
 11 a state law which requires citizens to reveal
 12 personal information under a promise of confidential-
 13 ity. In the United States, many statutes and
 14 regulations prohibit disclosure of certain records
 15 containing information which citizens are compelled
 legally to submit to federal, state or local govern-
 ments. These statutes generally are tied to spe-
 cific regulatory areas such as income tax returns,
 census reports, selective service records, public
 health records and accident reports, among others.

16 Id. at 371 (citations omitted). The above cases teach that the
 17 required reports privilege intends to protect confidential private
 18 information that private citizens are compelled to provide to the
 19 government. The purpose of this privilege could not possibly be
 20 more clear: "The purpose of the grant of such a privilege is to
 21 encourage persons to report voluntarily and accurately private
 22 information that is needed for effective governmental functioning."
 23 Id. (citation omitted). This purpose is clearly not fulfilled in
 24 the instant case, where the government agency itself created the
 25 report.^{2/} Ultimately, although some Defendants technically generated

26 ^{2/} In re Grand Jury Subpoena is also inapplicable in the present context in
 27 light of the very narrow question the Court considered: "[T]he precise
 28 question before this Court is whether . . . we should adopt, as a matter of
 federal common law, the proposition that public assistance records, required
 to be filed by state law under assurances of confidentiality, are privileged
 against use in federal grand jury proceedings." Id. (emphasis added).

1 reports, every kind of report is clearly not the type that this
2 privilege intends to protect.

3 Defendants also fail to establish that the reports they
4 generated are even required. After all, reports must be required in
5 order to invoke the required report privileged. They argue that
6 under California law, "law enforcement agencies must investigate
7 citizens' complaints and prepare reports regarding the
8 investigation" (Doc. No. 29 at 10.) However, even the
9 basic premise that the Penal Code requires investigative reports
10 appears incorrect.

11 Although the practical effect of California Penal Code
12 Section 832.5 may be that law enforcement agencies routinely
13 generate reports after citizen complaint investigations, this
14 section does not expressly require them to do so. Rather, it only
15 mandates that such agencies "shall establish a procedure to
16 investigate complaints" by the public and the only written document
17 provision in the entire section requires that agencies make "a
18 written description of the procedure available to the public." Cal.
19 Pen. Code § 832.5(a)(1) (emphasis added).

20 Moreover, properly read, the section's requirement that "any"
21 reports on citizen complaints be retained for five years does not
22 impose the mandatory duty to actually create reports, but rather
23 only requires that reports be retained if they are made. See id. §
24 832.5(b) ("Complaints and any reports or findings relating to these
25 complaints shall be retained for a period of at least five years.").
26 Even if the practical reality is that every law enforcement agency
27 in California in fact generates investigative reports, that is their
28 choice, not an express mandate of Section 832.5. All this section

1 requires is a procedure to investigate citizen complaints, which
2 could plausibly consist only of a hearing before a panel that
3 renders an oral decision. Ultimately, insofar as Defendants rely on
4 Section 832.5 to support the tenuous argument that the required
5 reports privilege applies here, it fails to lend such support.

6 However, even if Section 832.5 requires investigative
7 reports, Defendants ignore the underpinnings of the required reports
8 privilege that the very cases they cite explain. Simply because a
9 "report" is "required" does not bring it under the auspices of the
10 "required reports privilege." One must look to the kind of report
11 at issue and ask whether it is of the kind the privilege intends to
12 protect. Nothing in the cases Defendants cite supports the
13 invocation of this privilege in the context of the instant case, and
14 In re Grand Jury Subpoena in fact lends strong support to the
15 opposite conclusion.

16 Ultimately, this privilege has never been adopted by the
17 Ninth Circuit Court of Appeals and has been applied by only one
18 court in the entire Circuit. Accordingly, the Court will not adopt
19 the required reports privilege, and Defendants may not withhold any
20 documents on this basis. Accord Fisher v. Houser, 2010 U.S. Dist.
21 LEXIS 124519, *9-*10 (S.D. Cal. Nov. 23, 2010) (Skomal, M.J.).

22 **C. Deliberative Process Privilege**

23 Defendants next invoke the deliberative process privilege,
24 but again cite no controlling authority that has applied the
25 deliberative process privilege to these types of documents in the
26 context of a civil rights case. Other courts in the Ninth Circuit
27 have similarly rejected the use of this privilege in relation to
28 internal affairs investigations and records of witness or police
officer statements, as these communications are not designed to

1 contribute to the formulation of important public policy. See,
 2 e.g., Soto, 162 F.R.D. at 612-13 ("The 'deliberative process'
 3 privilege . . . is also inappropriate for use in civil rights cases
 4 against police departments."); Fisher, 2010 U.S. Dist. LEXIS 124519
 5 at *11-*12. Likewise, the Court rejects Defendants' invocation of
 6 the deliberative process privilege, and they may not withhold any
 7 documents on this basis.

8 **D. Self-Critical Analysis Privilege**

9 Quite plainly, the "self critical analysis privilege" does
 10 not exist in the Ninth Circuit. See Union Pac. R.R. v. Mower, 219
 11 F.3d 1069, 1076 n.7 (9th Cir. 2000); Lewis v. Wells Fargo & Co., 266
 12 F.R.D. 433, 439 (N.D. Cal. 2010). Defendants' use of Dowling v.
 13 Am. Haw. Cruises, 971 F.2d 423, 426 (9th Cir. 1992), to assert that
 14 the privilege applies here, without acknowledging the cases above,
 15 borders on a misstatement of law.^{3/}

16 The Court in Dowling discussed the theoretical contours of
 17 this privilege while simultaneously expressing doubts about its
 18 existence in the Ninth Circuit. Dowling, 971 F.2d at 425, 426
 19 ("This circuit has not yet considered whether there exists a
 20 so-called privilege of self-critical analysis," and "Even if such a
 21 privilege exists, the justifications for it do not support its
 22 application to voluntary routine safety reviews.") (emphasis added).
 23 The Court in Dowling assumed for the sake of argument that the

24
 25 ^{3/} Defendants specifically state:

26 Documents are protected from disclosure when (1) the
 27 information results from a critical self-analysis undertaken by
 28 the party seeking the protection; (2) the public has a strong
 interest in preserving the free flow of the type of information
 sought; and (3) if discovery were allowed, the flow of such
 information would be curtailed. Dowling v. American Haw.
Cruises, 971 F.2d 423, 426 (9th Cir. 1992). All three of
Dowling's [sic] criteria apply to the documents herein provided.

1 privilege existed and ultimately held that the district court abused
 2 its discretion when it applied the self-critical analysis privilege.
 3 Id. at 427. Dowling in no way establishes the existence of this
 4 privilege in the Ninth Circuit and provides no support for Defen-
 5 dants' assertion of the privilege here. Indeed, the Ninth Circuit
 6 Court of Appeals cited Dowling eleven years ago for the contrary
 7 proposition, that the Ninth Circuit "has not recognized this novel
 8 privilege." Union Pac. R.R., 219 F.3d at 1076 n.7. Nor has the
 9 Ninth Circuit recognized this privilege since.

10 Ultimately, Defendants assert the privilege in the face of
 11 (1) no law recognizing it in this Circuit and (2) a long line of
 12 District Court cases that expressly state that it does not exist in
 13 the Ninth Circuit. See, e.g., Price v. County of San Diego, 165
 14 F.R.D. 614, 617-19 (S.D. Cal. 1996); Fisher, 2010 U.S. Dist. LEXIS
 15 124519 at *10-*11; Pittman v. County of San Diego, 2010 U.S. Dist.
 16 LEXIS 97569, *4-*5 (S.D. Cal. Sept. 17, 2010) (Gallo, M.J.); Jewell
 17 v. Polar Tankers Inc., 2010 U.S. Dist. LEXIS 45949, *2-*4 (N.D. Cal.
 18 Apr. 8, 2010) ("While some Circuits have recognized the existence of
 19 a self critical analysis privilege, the majority have declined to do
 20 so. The Ninth Circuit has never recognized it and the US Supreme
 21 Court has disavowed it. The state courts in California have
 22 similarly rejected its existence."); Taylor v. L.A. Police Dep't,
 23 1999 U.S. Dist. LEXIS 23570, *16 (C.D. Cal. Nov. 10, 1999). The
 24 Court declines to apply this non-existent privilege.

25 **E. Privacy and Confidentiality Under California Law**

26 Defendants assert that law enforcement personnel files are
 27 private under California state privacy statutes and should not be
 28 disclosed as a result. However, Plaintiff brought this case under
 a federal statute, 42 U.S.C. § 1983, and it is well settled that

1 "questions of evidentiary privilege arising in the course of the
2 adjudication of federal rights are governed by the principles of
3 federal common law." Green v. Baca, 226 F.R.D. 624, 643 (C.D. Cal.
4 2005); Miller v. Pancucci, 141 F.R.D. 292, 297 (C.D. Cal. 1992)
5 (citing United States v. Zolin, 491 U.S. 554 (1989)). Accordingly,
6 this Court will not apply California statutory privileges to
7 Plaintiff's federal claims and Defendants may not withhold any
8 documents on state statutory privilege law grounds. Accord Fisher,
9 2010 U.S. Dist. LEXIS 124519 at *9-*10.

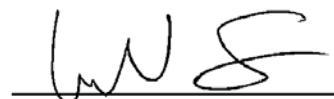
10 However, insofar as the privacy right is constitutionally-
11 based, the Court applies the analysis set forth in Soto. See Soto,
12 162 F.R.D. at 616-17.

13 **III. CONCLUSION**

14 Production of documents shall proceed as instructed in
15 Appendix A to this Order and shall be completed **on or before June**
16 **17, 2011**. All documents produced shall be subject to the operative
17 protective order (Doc. No. 22) in this matter, and sanctions will
18 issue for violation thereof.

19 IT IS SO ORDERED.

20 DATED: June 3, 2011

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23 Hon. William V. Gallo
24 U.S. Magistrate Judge
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Appendix A

Doc. #	Produce	Do Not Produce	Comments
p0001-p0023	x		<p><u>Hampton v. City of San Diego</u>, 147 F.R.D. 227, 229 (S.D. Cal. 1993); <u>Soto v. City of Concord</u>, 162 F.R.D. 603, 620-21 (N.D. Cal. 1995); <u>see also Carter v. City of Carlsbad</u>, 2011 U.S. Dist. LEXIS 14921, *5-*17 (S.D. Cal. Feb. 15, 2011) (discussing evaluative portions of internal affairs reports); <u>Fisher v. Houser</u>, 2010 U.S. Dist. LEXIS 124519, *17-*19 (S.D. Cal. Nov. 23, 2010) (discussing complaints in similar incidents).</p> <p>p0003: Redact Ms. Gonzalez's date of birth.</p> <p>p0003, p0004, p0012: Redact Ms. Gonzalez's street address.</p> <p>p0003 & p0012: Redact telephone numbers.</p> <p>p0021: Redact license plate number on fifth line from the bottom of the page.</p>
p0024	x		<p>Same authority as above.</p> <p>Redact license plate number and vehicle information that begins at the 2:00-minute mark and ends at the 2:22-minute mark.</p> <p>Redact telephone number information that begins at the 3:24-minute mark and ends at the 3:30-minute mark.</p>
p0025	x		Same authority as above.
p0026	x		
p0027	x		

Doc. #	Produce	Do Not Produce	Comments
p0028-p0068	x		<u>Soto v. City of Concord</u> , 162 F.R.D. 603, 620-21 (N.D. Cal. 1995) (discussing citizens' complaints); <u>see also Carter v. City of Carlsbad</u> , 2011 U.S. Dist. LEXIS 14921, *5-*17 (S.D. Cal. Feb. 15, 2011) (discussing internal affairs reports).
p0069		x	Irrelevant; Fed. R. Evid. 402.
p0070-p0090	x		
p0091-p0095		x	Attorney-client privilege.
p0096-p0112	x		
p0113	N/A		Has been produced.
p0114	x		Compact disc.
p0115-p0238		x	Intra-agency personnel matter; third-party highly private information, including inmate custody data sheets: Irrelevant; Fed. Evid. 402; Cal. Const. art. I, § 1.
p0239-p0240	x		Redact Sgt. Palmer's date of birth. Redact the zip code that appears in the middle of the page. Redact the telephone number that appears in the middle of the page. p0239: Redact entire bottom 2 purged investigations. p0240: Redact entire top 9 purged investigations; redact the third investigation from the bottom.
p0241-p0263		x	Irrelevant; Fed. R. Evid. 402. Fed R. Evid. 402; Cal. Const. art. I, § 1.

Doc. #	Produce	Do Not Produce	Comments
p0264-p0320	x		<p><u>See Green v. Baca</u>, 226 F.R.D. 624, 644 (C.D. Cal. 2005).</p> <p>p0264, p0268, p0279, p0289, p0301, and p0310: Redact Sgt. Palmer's employee identification number.</p>
p0321-p0488	x		<p>p0333-p0488: Redact names, initials, and Arjis numbers for all individuals other than Sgt. Palmer. Do not redact Sgt. Palmer's Arjis number.</p> <p>p0321: Redact identification number at top of page.</p> <p>p0327: Redact information on all CPR cards other than Sgt. Palmer's card.</p>